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No. 75-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL., RESPONDENTS

BRIEF OF ARKANSAS POWER & LIGHT COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Federal Water Power Act (act of June 10, 1920), 41 Stat. 1063, 16 U.S.C. §§791-823, as subsequently amended (46 Stat. 797) including amendments and additions and change of name by Title II of the Public Utility Act of 1935 (act of August 26, 1935, c. 687, 49 Stat. 838, 16 U.S.C. §§791a-825r:

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OPINION BELOW

The Petitioner makes adequate reference to the reports of the opinion of the court of appeals,[1] the initial order of the Federal Power Commission,[2] its order clarifying the prior order,[3] and its order denying rehearing.[4] The court opinion and the Commission's orders are contained as appendices in the Petition, and this Brief shall make references to those appendices where appropriate.

[1] *Conway Corp.* v. *F.P.C.*, 510 F.2d 1264 (D.C. Cir. 1975).

[2] *Arkansas Power & Light Co.*, 50 F.P.C. 289 (1973).

[3] *Arkansas Power & Light Co.*, 50 F.P.C. 1293 (1973).

[4] *Arkansas Power & Light Co.*, 50 F.P.C. 1780 (1973).

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in the Petition.

QUESTION PRESENTED

Whether the court of appeals erred by holding that the Federal Power Commission has the statutory authority to adjudicate allegations of discrimination between the rates for jurisdictional wholesale sales of electricity and retail sales of electricity, which are not subject to the Commission's rate reviewing power?

REASONS FOR GRANTING THE WRIT

1. The issue presented by this case is of fundamental importance to the Federal Power Commission's (Commission) responsibility under the Federal Power Act (16 U.S.C. §§791, *et seq.*) to establish just and reasonable rates for the sale of electric energy at wholesale in interstate commerce. By erroneously concluding that the Commission has the jurisdiction and resultant obligation to adjudicate claims of discrimination between interstate wholesale electric rates and retail electric rates, which are indisputably not subject to the Commission's jurisdiction, the court of appeals has imposed an unwarranted and heavy burden on the Commission. Arkansas Power & Light Company (AP&L or Company)[5] and other electric companies, which have both wholesale and retail customers, may be unduly penalized if the Commission's wholesale rate reviewing authority is subordinated to the retail rate jurisdiction of state utility commissions.

2. a. The decision below is erroneous and should be reviewed since it relies improperly on this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635 (1945). Although the court of appeals noted correctly that the *Panhandle* case is "distinguishable," it expressed the

[5]It is important to note that AP&L has not, in fact, engaged in any anticompetitive activity, nor has it made any attempt to "squeeze" its wholesale customers out of business, contrary to the implication of the court below (Petition, App. A, p. 3a). That the Company has not engaged in any anticompetitive activity is supported by the following excerpt from the U.S. Department of Justice, Antitrust Division, letter of December 12, 1971, to the then Atomic Energy Commission in connection with the Company's application to construct a nuclear power plant. As the Department of Justice stated:

> [AP&L] presently has dominance in electric bulk power supply and transmission in a major portion of Arkansas. But we have found no evidence that [AP&L] has exercised that control to the detriment of competition. (36 Fed. Reg. 25240, December 30, 1971)

view that the "underlying principle [of *Panhandle*] is one that permits the FPC to consider matters which would be completely nonjurisdictional taken by themselves, but are appropriate for consideration where germane to the meaningful execution of a jurisdictional function." (Petition, App. A, p. 18a) In actuality, not only is the precise holding of *Panhandle* inapposite to the issue at hand, the "underlying principle" of the case is clearly contradictory to the court's decision below.

Panhandle dealt with a Commission investigation under §5(a) of the Natural Gas Act (15 U.S.C. §717d(a)) following a complaint that the pipeline's interstate wholesale rates were unjust and unreasonable.[6] Since Panhandle's nonjurisdictional business was insignificant in comparison with its interstate wholesale business, the Commission did not consider it necessary to make an allocation of costs between the regulated and unregulated phases of the company's operations, as would normally be done in a proceeding involving a rate change by a regulated utility with a substantial degree of unregulated

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[6]Section 5(a) of the Natural Gas Act is analogous to §206(a) of the Federal Power Act (Petition, App. F, p. 51a) and states:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint . . . shall find that *any rate* . . . collected by any natural gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of the Commission*, . . . *is unjust, unreasonable, unduly discriminatory*, or *preferential*, the Commission shall determine the just and reasonable rate . . . and shall fix the same by order . . . . (15 U.S.C. §717d(a)) (Emphasis supplied)

The meaning of "subject to the jurisdiction of the Commission" is set out in §1(b) of the Natural Gas Act:

> The provisions of this chapter shall apply . . . to the *sale in interstate commerce of natural gas for resale* for ultimate consumption . . . but shall not apply to any other . . . sale of natural gas . . . . (15 U.S.C. §717(b)) (Emphasis supplied)

business. Instead of attempting to segregate costs and properties between the jurisdictional and nonjurisdictional classes of service, an attempt which would have been "theoretical" and "impractical" (324 U.S. at 646) in view of the unified character of the business and the fact that plant devoted exclusively to the nonjurisdictional business was less than one-sixth of one percent of the company's entire plant investment, the Commission adopted the more practical procedure of allocating all of the earnings from the entire business in excess of 6½ percent return to the interstate wholesale business (*id.* at 642). By this procedure, the Commission determined that Panhandle's jurisdictional rates were excessive and should be lowered.

This Court upheld the Commission's method in light of the "exceptional circumstances" of the case (*id.* at 647), but stated:

> We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. *Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the Act.* (*Id.* at 641, 642) (Emphasis supplied)

The Court then went on to say that §5(a), which as stated above is analogous in pertinent part to §206(a) of the Federal Power Act, "does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business." (*Id.* at 647)

Unlike Panhandle, AP&L's operations involve a significant degree of nonjurisdictional business; accordingly, in

compliance with the Commission's regulations, AP&L filed allocated cost of service studies detailing the costs associated with its jurisdictional business. The jurisdictional and nonjurisdictional aspects of AP&L's operations are easily discernible and, thus, there is no reason whatsoever why the Commission should be required to consider the Company's retail rates in establishing a just and reasonable level for the interstate wholesale rates.[7]

2. b. The decision below is also incorrect and should be reviewed since it contravenes this Court's reasoning in *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945), a companion rate investigation case to *Panhandle*, *supra*, wherein the Court upheld the Commission's procedure for allocating costs between the regulated and nonregulated portions of a pipeline's overall business. The Court emphasized that the problem was to allocate to each class of the business its fair share of the costs and observed that if the revenues from the jurisdictional business exceeded the costs allocable to that phase of the business, such rates could be lowered. Significantly, with respect to the determination of the proper wholesale rate, the Court added:

[7]As the Commission stated in its Petition, it must set the level of AP&L's wholesale rates on the basis of the cost of serving those wholesale customers, as demonstrated by the allocated cost of service studies that the Company has filed. This is consistent with the Commission's rate reviewing authority under the Federal Power Act, whereby it is restricted to selecting "the single proper rate on the basis of its assessment of the cost evidence." (Petition, p. 11) The Court's landmark decision in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), recognizes that the Commission has the responsibility in the rate reviewing area to determine the rate level necessary to recover the utility's jurisdictional costs and produce a return sufficient to maintain its financial integrity. *Cf. Bluefield Water Works and Improvement Comm'n* v. *Public Service Comm'n*, 262 U.S. 679 (1923)

> It is of course immaterial that the revenues from the intrastate sales or the direct industrial sales may exceed their costs, since the authority to regulate those phases of the business is lacking. (*Id.* at 588)

Further, the concurring opinion stated that "[i]t is true that the Natural Gas Act forbids discrimination only as between regulated rates and does not forbid discriminations between the regulated and nonregulated ones." (*Id.* at 615) The Commission's authority and jurisdiction under the Federal Power Act are no broader. As the statute and decisions of this Court make clear, the Commission should make its rate determinations on the basis of the costs involved in those areas of a company's business over which it has jurisdiction and not on the basis of determinations made by state regulatory bodies.

3. Contrary to the holding of the court below, the Commission's refusal to subordinate its authority under the Federal Power Act to that of state public service commissions by, in essence, establishing wholesale rates on the basis of retail industrial rates, is consistent with the responsibility placed on it by the decision of this Court in *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747 (1973).[8] In *Gulf States*, this Court held that the Commission should consider "in appropriate circumstances the anticompetitive effects of regulated aspects of interstate utility operations."

[8]The misplaced reliance by the court of appeals on *Gulf States*, as precedent for its decision (Petition, App. A, p. 20a), is further reason for granting the writ of certiorari in this case. Earlier in its decision, the court recognized the fact that it was going beyond the holdings of this Court in *Gulf States*, *supra* and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), when it stated:

> Neither case raised the issue, now before this court, of discriminatory effects caused by differences between wholesale and retail rates. (Petition, App. A, p. 12a)

(*Id.* at 758) In order to determine the "appropriate circumstances" under which antitrust allegations should be considered in a rate proceeding, reference must be made to §§205 and 206 of the statute, the relevant portions of which are set forth in the margin.[9]

As can be readily seen, the Act's declaration of policy limits the jurisdiction of the Commission to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but [such jurisdiction] shall not apply to any other sale of electric energy." (16 U.S.C. §824(b)) In light of the unambiguous language of §§205 and 206, the court of appeals' interpretation that the Commission is duty bound to consider an alleged discrimination in rates for different classes of customers, only one of which is subject to the jurisdiction of the Commission, is patently incorrect.

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[9]Section 205(b) provides:

> (b) No public utility shall, *with respect to any transmission or sale subject to the jurisdiction of the Commission*, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities or in any other respect, either as between localities or as *between classes of service*. (16 U.S.C. §824d(b)) (Emphasis supplied)

Section 206(a) provides:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or *sale subject to the jurisdiction of the Commission*, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. (16 U.S.C. §824e(a)) (Emphasis supplied)

The court's mistaken reading of §§205(b) and 206(a) is further illustrated by reference to pertinent portions of the legislative history of the Act. The colloquy between Representative Pettengill of the House Committee on Interstate and Foreign Commerce and Mr. Dozier Devane, one of the draftsmen of the Federal Power Act, which was cited by the Commission in its Petition[10] clearly shows that the organic statute was intended to fix a sharp jurisdictional line of demarcation between interstate and intrastate rates and, further, that the determination by the Commission of a just and reasonable rate for an electric company's interstate wholesale service should be wholly independent of the state regulated retail rates of that company.

In addition, Representative Cole, one of the sponsors of the statute in its final form, remarked during the House floor debates that the Act was not intended to give the Commission comprehensive intrastate rate jurisdiction coextensive with that given to the Interstate Commerce

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[10] Mr. Pettengill: You say this bill gives the Power Commission jurisdiction over wholesale energy in interstate transmission.

Mr. Devane: Yes.

Mr. Pettengill: Suppose the retail rate or wholesale rates in intrastate are fixed by the State Commission, and were so low that for the company to exist it had to charge exhorbitant rates for its wholesale interstate business. Then would not the doctrine of the Shreveport case apply?

Mr. Devane: No Sir.

* * * *

Mr. Devane: The interstate rate should be determined upon its reasonableness, its reasonableness without regard to what the intrastate rate is.

Mr. Pettengill: That is what it should be.

Mr. Devane: And the intrastate rate should be determined upon its reasonableness. (Petition, p. 8)

Commission (ICC) under the doctrine of the *Shreveport* case:[11]

> As to the jurisdiction of the States and State commissions, I doubt if any State commission or State officials familiar with the bill as it is now before you will say that the jurisdiction of the States has not been safeguarded and protected in a fair and lawful way. In doing so we have tried—and I think successfully—*to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit.* (79 Cong. Rec. 10384, June 28, 1935) (Emphasis supplied)

The court of appeals, while specifically recognizing that unlike the ICC the Federal Power Commission cannot review retail rates and pass on their justness and reasonableness, nonetheless concluded that the Commission may have to adjust wholesale rates to comport with retail rate levels (Petition, App. A, pp. 15a-16a). The only conclusion that can be drawn from this holding is that the court has determined that Congress, having limited the exercise of its jurisdiction over the interstate activities of electric utilities so as to immunize local regulation of retail rates from encroachment of federal regulation, left the federally approved rates subject to the vagaries of locally regulated rates.

Such a conclusion is both illogical and impractical and imposes a serious burden on the federal regulatory process. As this Court stated in *U.G.I.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965), with regard to the Natural Gas Act, "a regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." Recently, in *Corporation Comm'n* v. *F.P.C.*, 415 U.S. 961 (1974), the Court affirmed a ruling of the United States District Court for the Western District of Oklahoma that the setting of a statewide minimum price for wellhead gas by the state commission conflicted with the jurisdiction of the Federal Power Commission under the Natural Gas Act and that the federal authority vested in the Commission over wholesale rates for natural gas governed under the supremacy clause.

AP&L submits that the rates established by one jurisdiction cannot be used in determining the appropriate level of rates in the other. The determination of the justness and reasonableness of the wholesale rates of a public utility is to be made by the Commission, applying the provisions of the Federal Power Act, on the basis of operating expenses and capital costs, and not on the basis of the regulatory standards of state commissions. *Cf. F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. at 603.

[11] *Houston, East and West Texas Ry.* v. *United States*, 234 U.S. 342 (1914).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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